TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 29
Number 4 *Annual New York State Constitutional Issue*

Article 28

March 2014

Evaluating Candidacy Restrictions: The Implications of New York's Modified Approach

Brian Hodgkinson

Evaluating Candidacy Restrictions: The Implications of New York's Modified Approach

Cover Page Footnote
29-4

EVALUATING CANDIDACY RESTRICTIONS: THE IMPLICATIONS OF NEW YORK'S MODIFIED APPROACH

COURT OF APPEALS OF NEW YORK

Walsh v. Katz[1]
(decided June 2, 2011)

I. INTRODUCTION

Appellant Daniel Ross appealed from a decision of the Appellate Division, Second Department which upheld the constitutionality of a residency requirement mandating that the fifth member of the Southold town board, an elected position, reside on Fishers Island.[2] In reaffirming the constitutionality of the statutory provision, the New York Court of Appeals held that the impact of the residency requirement on the Southold residents' voting rights was incidental and minimal, and as such a rational basis standard of review, rather than a strict scrutiny standard, was appropriate.[3] Applying this standard, the court further held that the residency requirement was rationally related to a legitimate state interest[4] and thus did not offend the Equal Protection Clauses of either the New York or United States Constitutions, which are similar in their breadth and wording.[5]

This Note examines the Court of Appeals' decision in *Walsh v. Katz* and its implications on the New York courts' approach to constitutionally suspect election laws. Part II analyzes the court's treatment of the appellant's contentions, and argues that its failure to

---

[1] 953 N.E.2d 753 (N.Y. 2011).

[2] *Id.* at 756. Fishers Island is a small, sparsely populated, and unconnected island within the town of Southold.

[3] *Id.* at 759.

[4] *Id.* at 755. The main purpose of the residency requirement is to assure adequate representation in town government for the island's residents. *Id.* The legislative rationale as laid out in the "Laws of 1977" notes that because of the island's "unique geographical position," the Fishers Island board member is intended to act as a link between the island and the town government. *Walsh*, 953 N.E.2d at 755.

[5] *Id.* at 758, 760.

account for cautionary language in cited cases constituted an overly deferential posture. Part III surveys the federal approach to residency requirements, and election laws generally, which exhibits varying interpretations on how to approach the issue, in particular, disagreement over what *Anderson v. Celebrezze*[6] and its progeny entail for the treatment of challenged election laws. Part IV analyzes the court's modified approach to this issue as exhibited in *Walsh* and suggests a variation of the approach that further incorporates the flexibility of the *Anderson* analysis. Part IV.A tests the modified approach against the facts of *Walsh*, examining its implications. It posits that an overly deferential posture and the resultant oversight of factual considerations may have led the court to a different, and less meritorious, decision. Part V concludes by suggesting that in spite of the court's legislatively deferential posture, its reliance on the *Anderson* analysis allows for greater malleability in future challenges, which may be successful if that test's analytical flexibility is shrewdly employed.

II. THE OPINION

Appellant Ross's constitutional claims arose from his bid for the dual town justice/town board member seat that was reserved for a resident of Fishers Island, which he was not.[7] The petitioners in the suit brought an action to prohibit Ross from placing his name on the ballot based on his lack of residency.[8] Ross counterclaimed to have his candidacy petition validated, and also challenged the constitutionality of the residency requirement.[9]

The Suffolk County Supreme Court dismissed the proceeding, ruling that Ross had until thirty days after his election to obtain residency on Fishers Island.[10] On appeal, the Appellate Division modified the lower court order to require that Ross obtain residency upon taking the seat on the Town Board.[11] Addressing Ross's constitutional claims, the Appellate Division held that a rational basis stand-

[6] *Anderson*, 460 U.S. 780. Addressing challenges to Ohio's early filing requirement for independent candidates, the Court in *Anderson* enunciated a novel "balancing analysis" that it used it lieu of the traditional Equal Protection analysis. *Anderson*'s progeny exhibits disagreement over the proper application of the analysis.

[7] *Walsh*, 953 N.E.2d at 756.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

ard was applicable and that the residency requirement was justified by the existence of such a rational basis.[12] Ross appealed from the portions of the Appellate Division order that upheld the constitutionality of the residency requirement and the court's use of a rational basis standard in deciding that issue.[13] Although Ross eventually lost the election, the court retained the issue as a declaratory judgment proceeding.[14]

A. Appellant's Contentions: Standard of Review, Constitutional Claims, and Application of the Former to the Latter

Ross had three contentions, all of which were resolved against him by the court. The first was the threshold issue of the appropriate standard to apply in determining whether the residency requirement was unconstitutional: rational basis or strict scrutiny.[15] Ross argued that a strict scrutiny standard was applicable because the statutory provision affected fundamental interests, namely the right to vote and the right to run for public office.[16] In response, the court deemed the latter interest non-fundamental.[17] The second contention was the alleged constitutional violation, which was predicated upon two subclaims: first, that the residency requirement was violative of equal protection guarantees because it reserved one seat on the town board for a small segment of the larger population, thereby limiting the population's voting interests; and second, that the designation of one seat to a resident of Fishers Island created a district within the town and catered to the interests of a few residents over the whole, effectively diluting votes and offending State and Federal Equal Protection Clauses.[18] Finally, Ross argued that the legislative justifications for the requirement were neither "compelling" nor supported by any "ra-

---

[12] *Walsh*, 953 N.E.2d at 756.

[13] *Id.*

[14] *Id.* Additionally, Ross claimed that his right to vote was being unconstitutionally burdened by the residency requirement. *Id.*

[15] *Id.* at 756-57.

[16] *Walsh*, 953 N.E.2d at 757.

[17] *Id.* at 758 n.2 ("Strict scrutiny has been held applicable to ballot access cases involving restrictions based on wealth or restrictions that impose special burdens on new or small political parties or independent candidates." (citing Golden v. Clark, 564 N.E.2d 611, 613 (N.Y. 1990))).

[18] *Id.* at 757.

tional bases."[19]

B. The Court's Reasoning

The court relied almost entirely on United States Supreme Court decisions throughout its opinion. Prior to beginning its analysis, the court illustrated the nearly identical wording of the federal and New York Equal Protection clauses and stated that the New York clause is as broad as the federal clause.[20] Consequently, New York's analytical framework in approaching this issue is a synthesis of different federal approaches. Its implementation of that framework, however, is its own.

The first issue that the court undertook was the determination of the appropriate standard of review.[21] It prefaced its analysis of this issue by emphasizing the fundamental importance of the right to vote under the Federal Constitution, but with the caveat that voting rights and rights of political association were subject to limitations.[22] Relying on the Supreme Court's decision in *Anderson*,[23] the court stated that "whether the [voting regulation] governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, [the regulation] inevitably affects, at least to some degree, the individual's right to vote and his right to associate with others for political ends."[24] Thus, subjecting every electoral regulation to a standard of strict scrutiny could significantly impede a state's ability to run its elections efficiently because of the rigor that a

---

[19] *Id.* The words "compelling" and "rational bases" are terms of art in the Constitutional dynamic. The former accompanies a "strict scrutiny" standard of review, characterizing the type of interest that the state must be seeking to regulate. The latter defines what is required to support a "rational basis" standard of review, namely justifications that appear rationally related to advancing the state interest.

[20] *Id.*

[21] *Walsh*, 953 N.E.2d at 756-57.

[22] *Id.* at 757. Limitations on the right to vote are essential to the proper exercise of that right. *See* Burdick v. Takushi, 504 U.S. 428, 441 (1992) ("But the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."); *Burdick*, 504 U.S. at 433 ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " (quoting Storer v. Brown, 415 U.S. 724, 730 (1974))).

[23] 460 U.S. 780, 788.

[24] *Walsh*, 953 N.E.2d at 757 (quoting *Anderson*, 460 U.S. at 788).

statute must undergo to satisfy that standard.[25]

Having recognized the legitimate interest that a state has in regulating its electoral procedures, the court stressed the need for a balance between this interest and the fundamental right to vote, which is protected by the First and Fourteenth Amendments.[26] As such, the appropriate standard of review, when faced with a challenge to a state election law, is predicated upon a consideration of the extent to which the law impinges upon First and Fourteenth Amendment protections and, if the injury appears more than minimal, finding a compelling state interest to justify that invasion.[27] As the Court of Appeals stated, "a court's inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation directly infringes upon First and Fourteenth Amendment rights."[28] In applying this principle, the court relied on another Supreme Court case, *Bullock v. Carter*,[29] to delineate the mechanics of its application.[30] The court reasoned that although provisions affecting the right to run for office have an incidental effect on the right vote, such indirect and minimal effects do not by themselves compel a strict scrutiny standard of review.[31] Supplementing this notion was the court's statement that the right to run for a public office is not fundamental.[32]

Having established a rational basis as the standard for its continued review, the court addressed Ross's claim that the residency requirement impermissibly diluted votes by creating a district within an "otherwise at-large town election system."[33] The court rejected this argument by applying the reasoning that it used in addressing the issue of the appropriate standard of review, and also by drawing on

---

[25] *Id.*

[26] *Id.* at 758.

[27] *Id.*

[28] *Id.* The word "inquiry," as used in this context, and standard of review are analogous.

[29] Bullock v. Carter, 405 U.S. 134 (1972). *Bullock* concerned high filing fees for candidates seeking to run in the Texas primary elections. The Supreme Court held that the limiting effect of these fees on possible candidates resonated significantly enough with voters' rights so as to justify a more stringent standard of review, ultimately invalidating the law as violative of equal protection guarantees.

[30] *Walsh*, 953 N.E.2d at 758; *Bullock*, 405 U.S. at 143 ("[L]aws that affect candidates always have at least some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.").

[31] 953 N.E.2d at 758.

[32] *Id.* (citing Golden v. Clark, 564 N.E.2d 611 (N.Y. 1990)).

[33] *Id.* at 757.

analogies to two similar Supreme Court cases, *Dusch v. Davis*[34] and *Dallas County v. Reese*.[35]

Applying a rational basis standard of review, the court weighed the injury to the First and Fourteenth Amendment rights against the state justification for the law.[36] It reasoned that because all voters were able to vote for the Fishers Island seat and the regulation was based on a legitimate state interest, the law was neither discriminatory nor unreasonable.[37] Further, the court addressed concerns that although the votes are not actually diluted, the residency requirement may confer more influence to this smaller segment of the population by giving the island its own representative.[38] In resolving this issue, the Court relied on two notions: the first was the fact that a candidate running for the Fishers Island seat would not have to establish residency on the island until after that person had won the election, thereby leaving an opportunity for a non-Fishers Island resident to run for the seat, although not hold it;[39] the second was the idea that "elected officials represent all of those who elect them, and not merely those who are their neighbors."[40] The court further supplemented this reasoning by examining the two United States Supreme Court cases mentioned previously, *Dallas County* and *Dusch*, which both concerned Equal Protection Clause challenges to residency requirements.

C. *Dusch* and *Dallas County*: Unheeded Warnings

Dusch concerned the apportionment of an eleven-member city council in which four of its members were elected without regard to their residency and the remaining seven were required to be residents of each of the city's seven boroughs.[41] The populations of these boroughs ranged from less than 1,000 to almost 30,000.[42] The petitioners contended that this apportionment plan amounted to an unequal

---

[34] 387 U.S. 112 (1967).
[35] 421 U.S. 477 (1975).
[36] *Walsh*, 953 N.E.2d at 758.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 759.
[40] *Id.* (quoting *Dallas County*, 421 U.S. at 480).
[41] *Dusch*, 387 U.S. 112.
[42] *Id.*

representation of the city's voters.[43] The Supreme Court, however, disagreed, noting that the plan made "no distinction on the basis of race, creed, or economic status or location. Each of the 11 councilmen [was] elected by a vote of all the electors in the city."[44] Further, each vote held equal weight on all the candidates, which the Court deemed as an incentive for the candidates to act in the interest of all the voters, rather than only those in their districts.[45]

In *Walsh*, the Court of Appeals also relied on this notion, although it did not address the admonishments that followed the language in *Dusch*. Specifically, the Supreme Court stated that "the present consolidation plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or *representation*;' "[46] and further, its caveat that "[i]f a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow."[47]

In *Dallas County*, an equal protection challenge was brought against a statutory provision that required each of the four members of the county commission to reside in each of the four residency districts.[48] The claim was predicated on the fact that although the four districts had significantly disproportionate population densities, each nevertheless had to have one of its residents serving on the commission.[49] Upholding the validity of the residency requirement, the Supreme Court reasoned, as the Court of Appeals did in *Walsh*, that when "an official's 'tenure depends upon the countywide electorate[,] he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district.' "[50] However, the Court in *Dallas* made a distinction between the districts being used as merely a basis for the candidates' residency and having them function in a representative manner, hinting that the latter may be inappropriate.[51]

In *Walsh*, the Court of Appeals did not address this warning

---

[43] *Id*. at 113.

[44] *Id*. at 115.

[45] *Id*.

[46] *Dusch*, 387 U.S.at 115 (quoting, in part, Fortson v. Dorsey, 379 U.S. 433, 438 (1965)) (emphasis added).

[47] *Id*. at 116.

[48] *Dallas County*, 421 U.S. at 477.

[49] *Id*. at 478.

[50] *Id*. at 479-80 (quoting *Fortson*, 379 U.S. at 438).

[51] *Id*. at 480.

from *Dallas*, even though the Southold legislative notes on the residency requirement indicated that it was meant to give Fishers Island residents special representation on the town board.[52] The Court of Appeals relied on the idea that because all voters may partake in the Fishers Island election their votes were not diluted.[53] However, it seems that the importance of the "one vote, one person"[54] concept used by the court is in its assurance of equal representation, and having a special representative for a small segment of the population, contradicts the principle underlying this concept.

The Court of Appeals' failure to reconcile the cautionary language in *Dusch* and *Dallas* with the facts of *Walsh*, specifically the residency requirement's *representational* intent,[55] exhibited an overly deferential posture. Unequal representation was a glaring concern in *Dusch* and *Dallas*, yet the Court of Appeals gave the issue minimal treatment. Faced with a claim of unequal representation, the issue's resolution, at a minimum, demanded assessing the requirement's modern necessity, considering that the legislation was over thirty years old and predicated on a lack of communication with the mainland. Moreover, as this Note will illustrate, the court had the tools to undertake a more thorough analysis.[56] In the aggregate, these factors signal that greater explication was necessary. The court's failure to properly consider the foregoing factors likely resulted in an incorrect decision.

III. FEDERAL APPROACH

When assessing a constitutional challenge to a state election law that limits ballot access, federal courts are primarily concerned with the effects that such limitations may have on voters' rights.[57] Absent any substantial effect on voting rights, the court will undertake a less rigorous evaluation of the challenged law as it tries to balance state and individual interests.[58] Further, while a candidate's

---

[52] *Walsh*, 953 N.E.2d at 755.

[53] *Id.* at 759.

[54] *Id.* at 758 (stating that Ross's reliance on "one person, one vote" principle in apportionment cases is misplaced because those cases had the effect of diluting votes, resulting in unequal voting power).

[55] *Id.* at 755.

[56] *See infra* note 85 and accompanying text.

[57] *Anderson*, 460 U.S. at 786.

[58] Lubin v. Panish, 415 U.S. 709, 716 (1974).

right to run for office is not treated as fundamental,[59] the Supreme Court has held it to be as important as the state's interest in regulating its electoral process, stating that "[t]his legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity."[60] Thus, an election law limiting ballot access, notwithstanding any effect that it may have on voters' rights, will not likely pass constitutional muster if it appears arbitrary or "not reasonably necessary to the accomplishment of the State's legitimate election interests."[61] In instances where the electoral impediment was a residency requirement, with challenges often arising out of a requisite durational period attached to the residency and alleged dilution of votes, the courts' analyses have been no different.[62] Because of the collateral effects that candidacy requirements invariably have on voting rights, courts have deemed the rigor of their inquiry to be predicated upon the extent to which a regulation encroaches on constitutional interests.[63]

Starting from this base, the Supreme Court in *Bullock* emphasized the importance of realistically considering candidacy restrictions in light of their impact on voters.[64] Restrictions that impinge too far upon voters' rights require a greater degree of scrutiny and compelling state justifications.[65] The Court's decision in *Bullock*

---

[59] *Bullock*, 405 U.S. at 142-43 ("[T]he Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review.").

[60] *Lubin*, 415 U.S. at 716.

[61] *Id*. at 718. *See also* Turner v. Fouche, 396 U.S. 346, 364 (1970) (finding no reasonable state interest in the requirement that members of county board of education be freeholders). Although a standard of review was not explicitly enunciated by the Court, it is likely applying an "intermediate" standard of review, which falls between the "rational basis" and "strict scrutiny" standards. Such a standard has been applied where the state interest was "important," the benefits of the means used were substantially related to the interest, and the burden to be overcome was characterized as "not substantially more burdensome than necessary." R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 258 (2002).

[62] *See generally*, John D. Perovich, *Validity of Requirement that Candidate or Public Officer Have Been Resident of Governmental Unit for Specified Period*. 65 A.L.R.3d 1048 (originally published in 1975) (considering a broad array of federal and state cases where durational residency requirements have been challenged).

[63] *Burdick*, 504 U.S. at 434.

[64] *Bullock*, 405 U.S. at 143.

[65] *Id*. at 144.

illustrates the Equal Protection Clause analysis. The analysis begins with the threshold issue of whether a rational basis or a strict scrutiny standard is applicable; the former only requires a rational justification for the law, while the latter requires a compelling state interest for it.[66] The differing level of scrutiny between the two standards is substantial, with courts inclined to defer to a state's regulatory interest under the rational basis test[67] as opposed to the more exacting review that accompanies a strict scrutiny standard.[68]

Considering the Equal Protection Clause analyses of cases such as *Bullock*, the Court in *Anderson* delineated a balancing approach which it used in lieu of the equal protection analysis.[69] Eschewing the notion that a constitutional challenge to a state election law could be resolved in a formulaic manner, the Court laid out its analytical blueprint:

> A court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the pre-

---

[66] *Id*. at 142. *See also* Natl. Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."); *Burdick*, 504 U.S. at 434 ("The rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights . . . when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' " (quoting Norman v. Reed, 502 U.S. 279, 289 (1992))).

[67] *Anderson*, 460 U.S. at 788 ("Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.").

[68] *See Bullock*, 405 U.S. at 147 ("In addition to the State's purported interest in regulating the ballot, the filing fees serve to relieve the State treasury of the cost of conducting the primary elections, and this is a legitimate state objective; in this limited sense it cannot be said that the fee system lacks a rational basis. *But under the standard of review* [strict scrutiny] *we consider applicable to this case, there must be a showing of necessity*.") (emphasis added).

[69] *Anderson*, 460 U.S. at 786 n.7 ("In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment."). In addition to *Bullock*, the Court in *Anderson* also specifically mentioned Williams v. Rhodes, 393 U.S. 23 (1968), Lubin v. Panish, 415 U.S. 709 (1974), and Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979), as cases that it relied on in fashioning its alternative analysis.

> cise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[70]

The constitutional challenge facing the Court in *Anderson* stemmed from an early filing requirement for independent candidates running for United States President.[71] Weighing the voter onus against the state interests served, and considering the importance of a presidential election, the Court held in a 5-4 decision that the Ohio statute's exclusionary effect on independent voters outweighed the interests proffered by the state.[72] In contrast, the dissent focused on the rational nature of the laws and their allowance of reasonable access for independent candidates, urging restraint from interference with Article II grants.[73]

The split in the Court's decision could be seen as a byproduct of the alternative, more equivocal, analysis that it applied. Whereas an Equal Protection Clause analysis is more structured and demands a certain standard of review, the balancing analysis used by the Court in *Anderson* allows for more discretion regarding the depth of review applied to the suspect law, and lacks the guidance afforded by an analysis that is led by a prearranged standard.[74] Indeed, as the scion of this seminal case make clear, *Anderson*'s balancing analysis has proven especially conducive to varying interpretations. New York's novel application of the analysis in *Walsh* follows this trend.

---

[70] *Id*. at 789.

[71] *Id*. at 782.

[72] *Id*. at 806.

[73] *Id*. at 806-07 (Rehnquist, J., dissenting).

[74] *See* Crawford v. Marion County Election Bd., 553 U.S. 181, 205 (2008) (Scalia, J., concurring) (calling the *Anderson* test an "amorphous 'flexible standard' " (quoting *Burdick*, 504 U.S. at 428)). *See also* Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1328 (2005) (claiming that the *Anderson* analysis is more flexible and expressly provides judges with the tools to undertake a more thorough analysis).

IV. NEW YORK'S MODIFIED APPROACH

The Court of Appeals' approach in *Walsh* signals a departure from its previous, and arguably less ambiguous, mode of analysis, which was based predominantly on the federal Equal Protection Clause analysis. While previous New York cases concerning election laws continued to apply an equal protection analysis in spite of the evolving federal jurisprudence, the court in *Walsh*, so to speak, "updated" its analysis.[75] In *Walsh*, the Court of Appeals adopted the Equal Protection Clause analysis utilized by the United States Supreme Court in cases such as *Bullock*, but relied on the balancing test from *Anderson* in order to establish the appropriate standard of review.[76] However, because of the ambiguity that accompanies the *Anderson* analysis,[77] this altered analytical framework added a layer of opacity to the New York approach.

Although this analysis will require further application to effectively flesh out its nuances, the court in *Walsh* gave some indication of what its interpretation of *Anderson* entails. Specifically, the court's use of the language "In sum, a court's inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation directly infringes upon First and Fourteenth Amendment rights,"[78] is nearly verbatim to the Supreme Court's language in *Burdick*,[79] a decision that Justice Scalia interpreted as clarifying the *Anderson* test.[80] Additionally, the New York court's application of its analysis is very similar to Justice Scalia's interpretation of the *Burdick* decision expounded upon in his concurring decision in

---

[75] *See Golden*, at 623 (applying equal protection analysis, and forgoing *Anderson* analysis, to city charter prohibiting high city officers from holding political office as a requisite for their holding public office; decided seven years after *Anderson* decision).

[76] *Walsh*, 953 N.E.2d at 754.

[77] *See generally Burdick*, 504 U.S. 428 (disagreeing over what *Anderson* test entails); *Crawford*, 553 U.S. 181 (illustrating disagreement among concurring and dissenting opinions regarding how *Anderson* test should be objectified).

[78] *Walsh*, 953 N.E.2d at 758.

[79] *See Burdick*, 504 U.S. at 434 ("Under this standard [*Anderson* analysis], the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.").

[80] *See Crawford*, 553 U.S. at 205 (Scalia, J., concurring) ("*Burdick* forged *Anderson*'s amorphous 'flexible standard' into something resembling an administrable rule."). *But see Crawford*, 553 U.S. at 190 n.8 (reaffirming the original *Anderson* balancing test and stating that "[c]ontrary to Justice S[calia]'s suggestion . . . our approach remains faithful to *Anderson* and *Burdick*.").

Crawford.[81] Thus, Justice Scalia's concurrence would seem to offer a more lucid understanding of what the New York approach to this issue may entail. However, when considering the guidance that Justice Scalia attached to assessing the burden,[82] as well as the admonishments from *Dusch* and *Dallas County*,[83] it is evident that the New York court, while ostensibly relying to an extent on federal rationale, was reluctant to carry that rationale as far as its language permitted. Indeed, the New York court's injection of the *Anderson* analysis carried with it the flexible ambiguities, and analytical opportunities, endemic to the textual makeup of that test. As one scholar aptly stated, "The Anderson test already contains . . . most of the inquiries necessary for such a thorough and detailed analysis. . . . [T]he tools for a more rigorous analysis of ballot-access restrictions are clearly available; *the question is only whether courts will choose to make use of them*."[84] The court's scant examination of the rationale behind the residency requirement exhibited a reluctance to fully engage in *Anderson*'s thorough analysis. Considering that the test's analytical flexibility affords a more thorough treatment, the Court of Appeals' failure to employ that rigor displayed a firm deferential posture.

Thus, the Court of Appeals' approach to this issue modifies the federal analysis in a manner that yields a more lenient application. It gives minimal consideration to the federal notion that certain traits of an election law may stretch a rational basis standard to its limits, triggering greater review than that standard traditionally entails, or even tipping the standard at its threshold to one of "strict scrutiny."[85]

---

[81] *Compare Walsh*, 953 N.E.2d at 758 (utilizing *Anderson* analysis to establish the appropriate level of rigor to be used in the inquiry), *with Crawford*, 553 U.S. at 205 (Scalia, J., concurring) ("Since *Burdick*, we have repeatedly reaffirmed the primacy of its two-track approach. . . . [T]he first step is to decide whether a challenged law severely burdens the right to vote.") (citations omitted).

[82] *Crawford*, 553 U.S. at 205 (Scalia, J., concurring) ("Burdens are severe if they go beyond the merely inconvenient."); *Id*. at 206 (Scalia, J., concurring) (stating that the burden stemming from the regulation should be measured by its "*likely* impact") (quoting Storer v. Brown, 415 U.S. 724, 738 (1974)). In the case of *Walsh*, the "likely impact" of the regulation, practically considered, is the strong dissuasion of non-Fishers Island residents from running for that seat. The heavy burden of taking up residency on the island translates into a significant reduction of potential candidates, which significantly burdens voting rights.

[83] *See supra* Part II.C.

[84] Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1328 (2005) (emphasis added).

[85] *See Dallas County*, 421 U.S. at 480 (warning that indications of unequal representation may compel different results). *See also Bullock*, 405 U.S. at 143 ("In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact

This cautionary ethos is further supplemented by the Supreme Court's language in *Crawford*, which, applying the *Anderson* balancing analysis, cautioned that "[h]owever slight that burden [resulting from a state election law] may appear[,] . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' "[86] In contrast to this fluid analysis, the Court of Appeals' treatment of *Anderson* indicated an inevitably dichotomous outcome, resulting in either "strict scrutiny" or "rational basis" review, and an inclination to accept the legislative justification if it evinced a colorable rationale.[87] This narrow usage of *Anderson*'s language to establish a standard of review,[88] coupled with the failure to address the federal warnings attached to the decision,[89] resulted in an approach that exhibits an overly deferential posture towards legislative action and accepts legislative rationale at face value. Alleviating the rigidness inherent in pre-conceived standards is the main utility of the *Anderson* analysis, which seeks to achieve an adequate balance between voting rights and the regulatory interests that are necessary to maintain those rights.[90] While the New York court's "two-track"[91] analytical framework helped elucidate a very abstract subject, its attendant rationale failed to redress the factual merits.[92]

---

on voters.").

[86] *Bullock*, 405 U.S. at 191 (quoting *Norman*, 502 U.S. at 288-89).

[87] *Walsh*, 953 N.E.2d at 759-60.

[88] *Id*. at 758.

[89] *See Anderson*, 460 U.S. at 786 ("Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.' ") (citing *Bullock*, 405 U.S. at 143).

[90] *See Crawford*, 553 U.S. at 210 (Souter, J., dissenting) (recognizing the legitimacy of regulatory and voting interests, particularly in how the former supports the latter, and acknowledging the court's preference of a balancing analysis over a pre-set level of scrutiny in order to better accommodate the two interests).

[91] *Id.* at 205 (Scalia, J., concurring) (stating that *Burdick* forged *Anderson*'s analysis into an administrable rule and created a "two-track" approach, the first step is assessing the burden, and the second is applying the appropriate level of scrutiny, with severe burdens receiving "strict scrutiny").

[92] As previously mentioned, Justice Scalia's "two-track" interpretation of *Burdick* is similar to the Court of Appeals' analysis, which also uses a two-step approach. Analytically, both initially seek to divide the analysis into one of two diametric standards of review. The difference between the two analyses is in how the burden is assessed, with Justice Scalia stressing the burden should be measured by its "likely impact," and the Court of Appeals seemingly relying more upon the legislative regulatory interest. Regardless, however, both are flawed in their interpretation of *Anderson*'s analysis, which remains a flexible analysis and not one that requires rigid standards of review; that standard is "rational basis" or "deferential important regulatory interests." *See id.* at 190 n.8 ("Contrary to Justice Scalia's sug-

Rather, the Court of Appeals should retain this framework, but with a rationale more in line with *Anderson* and its progeny.[93] Its restraint was inconsistent with the language that it relied upon to determine the scope of its review.[94] Merit would have been better served had the court carried out its analysis in a more liberal manner, which would have been consistent with the language it used in fashioning its approach.[95]

A. The Implications of the Modified Approach

The facts of *Walsh* seem to trigger the warning signs that the various Supreme Court decisions attached to the analyses adopted by the Court of Appeals. However, because of the court's restrained level of review, the circumstances of the *Walsh* residency requirement that would likely raise flags under a federal approach do not receive much attention under the New York court's analysis. For example, the residency requirement appears to be a significant deterrent for any non-Fishers Island resident, as it entails the burden of relocating if elected to that seat on the town board;[96] in limiting their candidates, this deterrent has more than a minimal impact on the voters' rights. The rationale behind this aspect of the law would certainly warrant a deeper review under federal interpretations of the *Anderson*

---

gestion our approach remains faithful to *Anderson* and *Burdick*. . . . To be sure, *Burdick* rejected the argument that strict scrutiny applies to all laws imposing a burden on the right to vote; but in its place, the Court applied the 'flexible standard' set forth in *Anderson*. *Burdick* surely did not create a novel 'deferential important regulatory interests' standard.' ") (citations omitted).

[93] *See generally Anderson*, 460 U.S. at 786 ("Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.' ") (citing *Bullock*, 405 U.S. at 143); *Norman*, 502 U.S. at 288-89 (holding there must be a corresponding state interest that is "sufficiently weighty" to justify limiting a party's access to the ballot); *Burdick*, 504 U.S. at 434 (holding that a court must evaluate "the extent to which those [state regulatory] interests make it necessary to burden the plaintiff's rights."); *Crawford*, 553 U.S. at 190 (Rather than applying any 'litmus test' that would neatly separate valid from invalid restrictions . . . a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule . . . and make the 'hard judgment' that our adversary system demands).

[94] *Crawford*, 553 U.S. at 190 ("Rather than applying any 'litmus test' that would neatly separate valid from invalid restrictions . . . a court must identify *and evaluate* the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands.") (emphasis added).

[95] *See supra* note 81; discussion *infra* part IV.A.

[96] *Walsh*, 953 N.E.2d at 758-59.

analysis.[97] However, New York appears content with merely examining the veneer of legislative rationale, a disposition that seems at odds with the more flexible analysis it put in place. Furthermore, in *Walsh*, the justification for the residency requirement was based on a lack of connection between the Fishers Island residents and the mainland.[98] However, since the time of the residency requirement's reenactment in 1977,[99] there has been a substantial advance in communications technology, thus indicating that the reasons for the requirement may be anachronistic. Notwithstanding this indication, the Court of Appeals failed to give any consideration to the modern necessity of the residency requirement. *Walsh* displayed a firm aversion to submitting ballot access laws, and, presumably, the broader class of election laws subject to this modified approach, to thorough analytical review. Such an inclination, as *Walsh* demonstrates, may result in the omission of key factual inquiries.

V. CONCLUSION

Because it is not entirely clear how much consideration the Court of Appeals gave to federal indications of what may drive a candidacy restriction into the realm of unconstitutionality, the success of future challenges to election laws and candidacy restrictions did not gain much certainty in New York. However, this absence of consideration combined with the Court's adoption of different federal approaches, and also its heavy reliance on federal case law, leaves room for significant malleability in future challenges, which may be successful if these warnings are prominently placed in their makeup. Furthermore, the ambiguity inherent in the language of the *Anderson* test, as well as the general uncertainty surrounding what exactly it entails,[100] leaves ample room for creative reasoning. The apparent per-

[97] *See Crawford*, 553 U.S. at 190 (interpreting *Anderson* as requiring state justifications that are "sufficiently weighty" to justify candidate ballot access restrictions) (quoting *Norman*, 502 U.S. at 289)); *Id.* at 206 (Scalia, J., concurring) ("[T]he severity of the burden of a regulation should be measured according to its 'nature, extent, and *likely impact*.' ") (quoting *Storer*, 415 U.S. at 738)); *Id.* at 210-11 (Souter, J., dissenting) (characterizing *Anderson* analysis as a "sliding-scale balancing analysis" that demands "hard facts").

[98] *Walsh*, 953 N.E.2d at 755.

[99] *Id*. at 756.

[100] *See Crawford*, 553 U.S. at 208 (Scalia, J., concurring) ("The lead opinion's record-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned."); *See also* Bryan P. Jensen, *Crawford v. Marion County Election*

functory consideration of federal caveats by the Court of Appeals does not foreclose their use in future New York cases of this variety. Rather, it is prudent to recognize that the nascent *Walsh* analysis has yet to be refined by the Court of Appeals, and is borne out of conflicting jurisprudence on the federal level. Consequently, the Court of Appeals' initial treatment of the matter may be a product of the federal tumult still attached to the *Anderson* analysis, a response to an ineffectively argued challenge, or an inclination to withhold more thorough analysis. Equivocation clouds this analysis in its infancy. Only repeated exhibition will bear a more lucid account of what this analysis will entail for future New York cases.

Brian Hodgkinson[*]

Board: The Missed Opportunity to Remedy the Ambiguity and Unpredictability of Burdick, 86 DENV. U. L. REV. 535 (2009) ("The Court had the opportunity to resolve the ambiguity and unpredictability resulting from prior decisions [referring to *Anderson* analysis;] . . . however, the plurality opinions reached that conclusion by very different reasoning.").

[*] J.D. Candidate 2014, Touro College Jacob D. Fuchsberg Law Center; B.A. 2008 in History, The Catholic University of America. I would like to thank Professor Rena Seplowitz for her thoughtful comments on this Note, and my family for their continued support in all that I endeavor to do.